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No. 93-1638

In The

Supreme Court of the United States

October Term, 1993

JAMES C. MORGAN,

Petitioner,

v.

TOM SWINT, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The petition in this matter seeks review of a portion of the Eleventh Circuit's decision in *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), *on rehearing*, 11 F.3d 1030 (11th Cir. 1994). The respondents in this matter have filed a separate petition for certiorari seeking review of another portion of the Eleventh Circuit's decision in the same case. That petition is styled *Swint v. Chambers County Commission*, No. 93-1636. It is the position of the respondents in the present matter that the petition should be granted in No. 93-1636, but the petition in the present matter should be denied. The reasons for denial of the present petition are set out in the remainder of this brief.

STATEMENT OF THE CASE

This case stems from two law enforcement raids on a nightclub in Chambers County, Alabama, known as the Capri Club. The plaintiffs in the case, who are respondents in the present matter, are two of the owners of the club, a club employee, and a club patron. Pet. App. 3-4; 5 F.3d at 1439.

Because of allegations that narcotics transactions had taken place at the club, the Sheriff of Chambers County, James C. Morgan, authorized a raid involving 30 to 40 officers from various localities and law enforcement agencies. It occurred on December 14, 1990. An undercover officer went in the club and purchased marijuana and other drugs from a patron of the bar. This officer then left the club and signaled the others. The raid began with eight SWAT team officers dressed in black, some wearing ski masks, followed immediately by the rest of the 30-40 member task force. The person who sold the drugs was identified and arrested. Task force officers pointed their guns at some of the citizens inside the club, including some of the plaintiffs, searched the cash register and door receipts, and confiscated currency from the door receipts. People in the club were not allowed to leave or go to the restroom for the next sixty to ninety minutes while the task force occupied the establishment. Only two people were found to be involved in narcotics and arrested, the person who sold the narcotics to the undercover officer and that person's brother, who had some of the marked money from the sale in his pocket. Pet. App. 4-6; 5 F.3d at 1440.

Although Sheriff Morgan was not present at the first raid, he was debriefed on it shortly thereafter by participants. Pet. App. 23; 5 F.3d at 1446-1447. Sheriff Morgan authorized a second raid that took place a little over three months later. It was on March 29, 1991, and started again with an undercover purchase of drugs from a patron in the club, followed by a similar raid which, again, lasted sixty to ninety minutes with little respite for those inside. During the raid, task force members chambered rounds of ammunition in their guns and pointed the guns at citizens in the club, ordering them to the floor. A shotgun was pointed at the face of one of the plaintiffs by an officer whose hand was on the trigger. Another plaintiff was held at gunpoint much of the time. Some of the citizens were searched, including one of the plaintiffs, who was pushed outside the club, grabbed, shoved against a wall, and searched. Another citizen was pushed off a bar stool. No one was arrested during this second raid. Pet. App. 6; 5 F.3d at 1440.

During one of the raids, at least one officer said the officers would keep coming back until the club was closed. No other law enforcement operation of this kind had been conducted in the twenty-one year tenure of the Sheriff Morgan. Sheriff Morgan was not present at either raid, although he authorized both. Pet. App. 7; 5 F.3d at 1440.

As a result of the raids, the plaintiffs filed their complaint in the district court and included claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) raising issues of a denial of rights under the Fourth Amendment and the equal protection and due process clauses of the Fourteenth Amendment. The defendants were the Chambers

County Commission, the Chambers County Sheriff's Department, Sheriff Morgan (officially and individually), the City of Wadley, Alabama (whose officers and chief were involved in the raid), Wadley Police Chief Freddie Morgan (officially and individually), and Wadley Police Officer Gregory Dendinger (officially and individually). Motions to dismiss were granted in part and denied in part, and are not relevant here. Motions for summary judgment also were granted in part and denied in part. Pet. App. 7-8; 5 F.3d at 1439, 1441.

Because some of the denials of summary judgment involved issues of qualified immunity, some of the defendants, including Sheriff Morgan, appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). On appeal, the Eleventh Circuit held that summary judgment should have been granted in favor of Sheriff Morgan on the due process claims brought by the plaintiffs, but was properly denied on the Fourth Amendment and equal protection claims. Pet. App. 28; 5 F.3d at 1448. On rehearing, the Eleventh Circuit panel reconsidered the equal protection ruling and held that summary judgment should have been granted in the Sheriff's favor on that claim as well. Pet. App. 71-74; 11 F.3d 1030. Sheriff Morgan has filed this petition seeking a writ of certiorari to review a portion of the Eleventh Circuit ruling which did not end in his favor. (The petition filed by the respondents in *Swint v. Chambers County Commission*, No. 93-1636, seeks review of the Eleventh Circuit's holding that Chambers County is not liable for Sheriff Morgan's actions because, according to the Eleventh Circuit, he is not a final county

policymaker in the area of law enforcement. Pet. App. 31-34; 5 F.3d at 1450-1451.).

REASONS FOR DENYING THE WRIT

The writ in the present case should be denied for the following reasons:

The first issue raised by the petitioner is whether constructive knowledge of a subordinate's misconduct is sufficient to overcome qualified immunity under § 1983. Petition 9-16. The most immediate problem is that this case may not raise the issue at all, and certainly does not raise it in any clear fashion, inasmuch as there is a genuine and disputed issue of material fact as to whether Sheriff Morgan had *actual* knowledge of the misconduct. The entire focus of the petition is based upon the Sheriff's assertion that he had no knowledge of the misconduct or even remote involvement in it. While the petition repeatedly contends that he had only minimal involvement in the planning of the raids and did not know of the constitutional violations, pet. 4, 6-7, 13-15, the petition cites to nothing in the lower court opinions, or elsewhere, to support those factual contentions.

Indeed, the Eleventh Circuit held to the contrary. First, that court rejected Sheriff Morgan's contention that his personal participation was required before any liability could attach to him. Pet. App. 22-23; 5 F.3d at 1446. Second, the Eleventh Circuit noted that the Sheriff apparently had actual knowledge of the unconstitutional features of the first raid, yet authorized the same conduct

three months later in the second raid. As the Eleventh Circuit explained:

> [A]fter the first raid, Sheriff Morgan was debriefed on how the raid had been conducted. . . . [W]hat happened at the second raid was materially identical to the events of the first raid. Thus, even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better.

Pet. App. 23; 5 F.3d at 1447. This was clearly sufficient for the Eleventh Circuit to uphold the district court's denial of summary judgment on the Fourth Amendment claim. Given that it appears the Sheriff had *actual* knowledge of the wrongdoing, it makes no sense to grant certiorari to review the issue of liability under § 1983 with respect to constructive knowledge.

There is another problem. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), permits an appeal from a denial of summary judgment in a § 1983 case only when the summary judgment motion was based on qualified immunity and only "to the extent that [the denial] turns on an issue of law." It is clear that the Eleventh Circuit's ruling upholding the denial of summary judgment turned, at least in part, on the presence of a *factual issue* regarding the scope of the Sheriff's knowledge of misconduct in light of his authorization of the second raid. While other issues before the Eleventh Circuit may have raised qualified immunity questions of law, it is clear that an appeal would not be proper under *Mitchell* if the essentially

factual issue presented here by the petitioner were the only issue in the case. Given that an appeal on this issue would be improper, the granting of certiorari would not seem to be advisable.

As all of this illustrates, the question of the Sheriff's liability for the Fourth Amendment violations turns in large part on issues of fact which are not appropriate for this Court's review on certiorari.

Even if this issue were an issue of law, the petitioner is quite overstated in contending there is conflict among the circuits. Pet. 10-13. None of the cases cited by the petition seem to lay down broad rules of law regarding actual versus constructive knowledge, but instead seem to be describing the operative principles that govern the particular factual situations arising in each.

Moreover, there seems to be little disharmony in these cases with the approach taken by the Eleventh Circuit. For example, in attempting to show a conflict in the circuits, the petition cites to *Redman v. County of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992), and contends, in a parenthetical, that the sheriff in that case was not liable for the second rape of an inmate when the sheriff had not been "personally apprised" of the first rape. Pet. 11. That is a misstatement of *Redman*. In *Redman*, the Ninth Circuit held that the sheriff was not liable through any personal involvement since he had not been "personally apprised" of a telephone call regarding the rape. 942 F.2d at 1446. However, the en banc Ninth Circuit added:

> Nonetheless, our inquiry does not end here. "A supervisor may be liable if there exists *either* (1)

> his or her personal involvement in the constitutional deprivation, *or* (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989).

942 F.2d at 1446. Based upon evidence of such a causal connection, the Ninth Circuit reversed a directed verdict that had been entered in favor of the Sheriff and held that a remand was required for a jury to consider the Sheriff's liability.

The Ninth Circuit's articulation of the analytical framework is quite similar to that of the Eleventh Circuit, which stated in the present case:

> [A]lthough § 1983 does require proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation, "[p]ersonal participation . . . is only one of several ways to establish the requisite causal connection." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986).

Pet. App. 22; 5 F.3d at 1446. The comparison of *Redman* with the present case, and a review of the other cases cited by the petition, demonstrate that there is little conflict among the circuits regarding the appropriate framework for analyzing these issues. To the extent there is conflict, the issues are not adequately posed by this case.

The second issue raised by the petitioner involves a contention that the circuits are in conflict over whether qualified immunity applies to a § 1985(3) claim. Again, there is a question as to whether this case adequately presents the issue. § 1985(3) requires a conspiracy to deny equal protection of the law. The Eleventh Circuit held that

summary judgment should have been granted for the Sheriff on the equal protection claim against him. Pet. App. 71-74; 11 F.3d 1030. Given that the equal protection claim was brought in conjunction with § 1983 and § 1985(3), it will be up to the district court to sort out whether the § 1985(3) claim survives the Eleventh Circuit's ruling. However, it is not a matter that should occupy this Court's time.

Moreover, while a conflict does appear to exist among the circuits regarding the availability of a good faith defense under § 1985(3), the conflict is of little practical importance, and does not appear even to be raised by this case. The Eleventh Circuit, along with the Ninth Circuit, has held that qualified immunity is unnecessary since § 1985(3) requires a conspiracy for the purpose of denying equal protection of the laws, with a race or class-based animus. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1814 (1993); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1049-1051 (9th Cir. 1988). Intentional discrimination is an element of the claim. Because the law is clearly established that intentional equal protection violations are unconstitutional, qualified immunity would be something of a redundancy. *See, Gutierrez*, 838 F.2d at 1051, n. 29. By contrast, the Seventh Circuit in *Auriemma v. Rice*, 910 F.2d 1449, 1457-1459 (7th Cir. 1990) (en banc), *cert. denied*, 111 S.Ct. 2796 (1991), held that qualified immunity does apply, at least in some circumstances, and the Tenth Circuit took the same approach, without much discussion, in *Gallegos v. City and County of Denver*, 984 F.2d 358, 364 (10th Cir. 1993), *cert. denied*, 113 S.Ct. 2962 (1993). (Contrary to the contentions in the petition, pet.

17, the Second and Sixth Circuits did not appear to address the issue in, respectively, *Mahoney v. Hankin*, 844 F.2d 64 (2nd Cir. 1988), and *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983)).

Because the law is clearly established regarding intentional equal protection violations resulting from conspiracies, whether or not qualified immunity is applicable is going to make little difference in most cases. The only situations where it might make a difference are those similar to the one that arose in *Auriemma*, involving the scope of § 1985(3) (or cases involving the scope of the equal protection clause), and whether it is clearly established that particular factual scenarios fall within that scope. That sort of issue is not presented in the present case, which raises a claim of selective enforcement on the basis of race through the raids of a club populated by black citizens. As the district court noted, the law was clearly established at the time of the raids that selective enforcement of laws on the basis of race violates the equal protection clause. Pet. App. 58. Thus, qualified immunity would make no difference in this case.

Indeed, because the issue has little bearing on the outcome of the present case, the Eleventh Circuit did not even discuss the question of qualified immunity in the § 1985(3) context. Clearly, then, this case is not appropriate for certiorari review on that issue.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari filed by Sheriff Morgan should be denied.

Respectfully submitted,

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